American Bar Association
www.supremecourtpreview.org

No. 07-9712

IN THE
Supreme Court of the United States

JAMES BENJAMIN PUCKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

KEVIN P. MARTIN
DAHLIA S. FETOUH
Counsel of Record
JODI B. KALAGHER
NATALIE F. LANGLOIS
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for *Amicus Curiae*

November 24, 2008

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Prosecutorial Breaches of Plea Agreements Undermine the Plea Bargaining Process and Pose Serious Consequences for the Criminal Justice System. 4

II. Whether Under the Plain Error Standard or Not, the Court Should Adopt a Rule Requiring Automatic Reversal for Breaches of Plea Agreements 11

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. *Fulminante*,
499 U.S. 279 (1991) 15, 17

Berger v. *United States*,
295 U.S. 78 (1935) 9

Blackledge v. *Allison*,
431 U.S. 63 (1977) 12

Bordenkircher v. *Hayes*,
434 U.S. 357 (1978) 10

Bowers v. *State*,
500 N.E.2d 203 (Ind. 1986) 21

Brady v. *United States*,
397 U.S. 742 (1970) 5, 6

Brown v. *Mississippi*,
297 U.S. 278 (1936) 19

Commonwealth v. *Reyes*,
764 S.W.2d 62 (Ky. 1989) 21

Florida v. *Nixon*,
543 U.S. 175 (2004) 8

Gray v. *Mississippi*,
481 U.S. 648 (1987) 20

Johnson v. *United States*,
520 U.S. 461 (1997) 13, 15

Mabry v. *Johnson*,
467 U.S. 504 (1984) 12

Machibroda v. *United States*,
368 U.S. 487 (1962) 12

People v. *McCrory*,
41 Cal. 458 (1871) 4

Santobello v. *New York*,
404 U.S. 257 (1971) ..... *passim*

Swang v. *State*,
42 Tenn. 212 (1865) 4

United States v. *Bayaud*,
23 F. 721 (C.C.S.D.N.Y. 1883) 4

United States v. *Camarillo-Tello*,
236 F.3d 1024 (9th Cir. 2001) 17

United States v. *Cotton*,
535 U.S. 625 (2002) 15

United States v. *Dominguez-Benitez*,
542 U.S. 74 (2004) 15

United States v. *Gonzalez-Lopez*,
548 U.S. 140 (2006) 16, 17

United States v. *Olano*,
507 U.S. 725 (1993) ..... *passim*

United States v. *Ruiz*,
536 U.S. 622 (2002) 10

Vasquez v. *Hillery*,
474 U.S. 254 (1986) 17, 19, 21

Waller v. *Georgia*,
467 U.S. 39 (1984) 17

Young v. *United States ex rel. Vuitton et Fils S.A.*,
481 U.S. 787 (1987) 20

STATUTES:

18 U.S.C. § 3553(e) 8

FEDERAL RULES:

Fed. R. Crim. P. 11 9

Fed. R. Crim. P. 52 ..... *passim*

OTHER AUTHORITIES:

Albert W. Alschuler, *Plea Bargaining and Its History*, 13 Law & Soc'y Rev. 211 (1979) 4, 5

Michale D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. Rev. 159 (2008) 7

Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. Colo. L. Rev. 863 (2004) 8, 10

Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 Law & Soc'y Rev. 247 (1979) 4

Malcolm D. Holmes et al., *Plea Bargaining Policy & State District Court Caseloads: An Interrupted Time Series Analysis*, 26 Law & Soc'y Rev. 139 (1992) 6

John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 Law & Soc'y Rev. 261 (1979) 5

Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992) 6, 8, 9

Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79 (1988) 19

Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471 (1993) 10

Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 Int'l J. Psych. 117 (2000)..... 11

U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2004* 7, 8

U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics for Fiscal Year 2007 6

Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409 (2003) 5

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,000 attorneys and nearly 40,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL seeks to promote the proper and constitutional administration of justice, and to that end concerns itself with the protection of individual rights and the improvement of the criminal law, practices, and procedures. NACDL submits this brief in the hope that it may aid the Court in its consideration of the fundamental constitutional and societal interests that are implicated when a prosecutor breaches a plea agreement that results in the conviction of a criminal defendant.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case implicates a criminal defendant's critical decision to relinquish fundamental constitutional rights, including the guaranteed right to a jury trial and the right against self-incrimination. The specific question before this Court is whether Rule 52(b)'s plain error standard of review applies when a prosecutor breaches a plea agreement that results in a defendant's conviction, but the breach is raised for the first time on appeal. To assist the Court in deciding this question, this brief first describes the extent to which prosecutorial breaches of plea agreements pose serious consequences for the criminal justice system. The brief then explains that application of the plain error standard demonstrates that breaches of plea agreements will *always* require reversal. Because application of the plain error standard would always lead to the same result, the Court should simplify matters by adopting a rule requiring automatic reversal whenever a prosecutor breaches a plea agreement, whether that error was raised at the district court or not.

Plea bargaining has long been a critical component of this country's criminal justice system. Guilty pleas now account for over ninety-five percent of federal convictions, thereby saving the government and society tremendous resources by significantly decreasing the number of trials, reducing the necessary personnel and infrastructure to handle those trials, and curtailing the costs of lengthy pretrial detainment. In exchange, defendants relinquish fundamental constitutional rights in the hope that the sentencing judge will adopt the negotiated recommendation of the prosecution. Plea

bargaining, however, only works when defendants trust those—the prosecutors—on the other side of the agreement. Thus, prosecutorial breaches of plea agreements that go unchecked threaten to undermine not only the plea bargaining system, but the entire criminal justice system.

Even if the Rule 52(b) plain error analysis in some sense applies, a holding in this case that prosecutorial breaches of plea agreements necessarily require reversal would ensure that prosecutorial breaches are minimized and that society's faith in the fair and efficient operation of the criminal justice system is maintained. A careful review of this Court's structural error cases demonstrates that certain fundamental constitutional errors are subject to correction regardless of prejudice. This Court has shown a willingness to exempt errors from a prejudice analysis when, *inter alia*, the effect of the error on the outcome of the proceeding is difficult to determine, when it is necessary to deter future similar errors, or when the error threatens the integrity of the legal system. These same rationales all apply to the issue before the Court in this case. Not only would it be difficult for a court to assess the prejudicial impact of a breached plea agreement on the outcome of the sentencing hearing, but such a holding would ensure that future prosecutorial breaches are deterred and the integrity of the criminal justice system is preserved.

ARGUMENT

I. Prosecutorial Breaches of Plea Agreements Undermine the Plea Bargaining Process and Pose Serious Consequences for the Criminal Justice System.

1. Consideration of the question presented requires an understanding of the key role of the plea bargaining process in the modern criminal justice system.

Plea bargaining has been a component of the criminal justice system since the late nineteenth century. Albert W. Alschuler, *Plea Bargaining and Its History*, 13 Law & Soc'y Rev. 211, 223 (1979); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 Law & Soc'y Rev. 247, 256 (1979) (noting that "plea bargaining in the literal sense is at least a century old"); see also, *e.g.*, *United States* v. *Bayaud*, 23 F. 721 (C.C.S.D.N.Y. 1883). Although some courts in the late nineteenth and early twentieth centuries denounced the practice of plea bargaining, "[t]he gap between judicial denunciations of plea bargaining and the behavior of many urban courts at the turn of the century and thereafter was apparently large." Alschuler, *supra*, at 227; see, *e.g.*, *People* v. *McCrory*, 41 Cal. 458, 462 (1871) (granting defendant leave to withdraw guilty plea when defendant pled guilty "mainly from the hope that the punishment, to which the accused would otherwise be exposed, may thereby be mitigated"); *Swang* v. *State*, 42 Tenn. 212, 213–14 (1865) (allowing defendant to withdraw guilty plea despite plea bargain because state constitutional

right to jury trial could not "be defeated by any deceit or device whatever").

By the late 1920s, "plea bargaining had become a central feature of the administration of justice." Alschuler, *supra*, at 232. A number of factors may have influenced the development and increased use of plea bargaining, including urbanization, increased crime rates, increased criminal caseloads, expansion of substantive criminal law, and the growing complexity of the trial process. See *id.* at 235–43; see also John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 Law & Soc'y Rev. 261, 262 (1979) ("Over the intervening two centuries the rise of the adversary system and the related development of the law of evidence has caused [the] common law jury trial to undergo a profound transformation, robbing it of the wondrous efficiency that had characterized it for so many centuries."). Plea bargaining eventually became so prevalent in the criminal justice system that it was described by this Court in the 1970s as "inherent in the criminal law and its administration," *Brady* v. *United States*, 397 U.S. 742, 751 (1970), and "not only an essential part of the [criminal] process but a highly desirable part" of the criminal justice system, *Santobello* v. *New York*, 404 U.S. 257, 261 (1971).

The proportion of guilty pleas in the federal system has been moving steadily upward for over thirty years, and has seen dramatic increases in the past fifteen years. See Ronald Wright & Marc Miller, Comment, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409, 1415 (2003). In 2007, for example, nearly ninety-six percent of all charged federal offenses were resolved by guilty

pleas, and over 69,000 federal defendants pled guilty. See U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics for Fiscal Year 2007 at Fig. C and Table 10, *available at*: http://www.ussc.gov/annrpt/2007/sbtoc07.htm. In some federal district courts, close to ninety-nine percent of all criminal defendants pled guilty in 2007. See *id.* at Table 10. As one set of commentators has noted, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992) (emphasis in original).

Indeed, it is questionable whether the criminal justice system could function at all without plea bargaining. As this Court recognized over thirty-five years ago, if every criminal charge resulted in a trial, "the States and the Federal Government would need to multiply by many times the numbers of judges and court facilities." *Santobello*, 404 U.S. at 260; see also *Brady*, 397 U.S. at 752 ("scarce judicial and prosecutorial resources are conserved" when defendants plead guilty); Malcolm D. Holmes et al., *Plea Bargaining Policy & State District Court Caseloads: An Interrupted Time Series Analysis*, 26 Law & Soc. Rev. 139 (1992) (examining the effect of a plea bargaining ban in El Paso, Texas in 1975 and finding that after the implementation of the ban, the jury trial rate nearly tripled and the felony disposition rate substantially declined).

2. The reasons for the increasing and dominant role played by plea bargaining are not difficult to discern, as plea bargains offer advantages both to

society and to criminal defendants. From society's perspective, disposition after plea agreement

> leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial, it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 261; see also Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. Rev. 159, 162 (2008) (observing that plea agreements often involve concessions in addition to the guilty plea, including a defendant's agreement to provide valuable information regarding the criminal conduct of co-defendants or other individuals).

From a defendant's perspective as well, plea bargains impart important benefits. Federal defendants who pled guilty during 2004 had their cases processed approximately 5.4 months faster than defendants who went to trial. See U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2004*, at 60 & Fig. 4.2, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs04.htm. Defendants convicted by guilty pleas also typically receive better sentences than those convicted after trial. For example, in 2004, seventy-seven percent of offenders convicted by guilty plea received some prison time, compared to eighty-eight percent of defendants

convicted at trial. *Id.* at 70 & Fig. 5.3. Moreover, the average prison term for defendants who were convicted at trial in 2004 was almost three times longer (148.2 months on average) than the term imposed on defendants convicted after a guilty plea (56.2 months on average). *Id.*; see also Scott & Stuntz, *supra*, at 1915 (plea bargaining provides a way for "[c]riminal defendants, as a group, [to] reduce the risk of the imposition of maximum sanctions"); 18 U.S.C. § 3553(e) (allowing departures under the federal sentencing guidelines for criminal defendants who provide substantial assistance in the investigation or prosecution of another person who has committed an offense).

3. While plea bargaining affords advantages both to society and to a criminal defendant, the price of a plea bargain to the defendant is steep. The essence of plea bargaining is a prosecutor's promise to the defendant to make (or not make) certain sentencing recommendations to the judge, in exchange for the defendant foregoing his fundamental constitutional trial rights, such as the right against self incrimination, the right to confront one's accusers, and the right to a trial. See Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. Colo. L. Rev. 863, 886 (2004); see also *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (discussing rights waived by a guilty plea).

Given the fundamental constitutional rights afforded all criminal defendants, this Court has stressed the prosecutor's duty to refrain from unfair dealing in the prosecution of criminal defendants:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. *United States*, 295 U.S. 78, 88 (1935).

The obligation placed on a prosecutor to "play fair" is certainly understandable considering that prosecutors enter the plea bargaining process with several key advantages over defendants. As an initial matter, many plea agreements bind federal defendants to a particular outcome—a conviction—while the prosecution agrees only to recommend a particular sentence, which a judge is free to disregard. See Fed. R. Crim. P. 11(c)(1)(B), 11(c)(3)(B); see also *Santobello*, 404 U.S. at 262 (noting that there is "no absolute right to have a guilty plea accepted," and that "[a] court may reject a plea in exercise of sound judicial discretion"); Scott & Stuntz, *supra*, at 1954. Moreover, defendants enter the plea bargaining process as unwilling participants and must choose between a trial or a guilty plea,

both of which carry the possibility of punishment. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (holding that due process was not violated when state prosecutor carried out threat made during plea negotiations to re-indict defendant on more serious charges, and noting that plea bargaining process "presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Cook*, *supra*, at 908, 919.

Furthermore, in the vast majority of cases, a defendant is forced to make this difficult choice with significantly fewer financial and informational resources than the prosecutor. See *United States* v. *Ruiz*, 536 U.S. 622, 633 (2002) (prosecutor not required to disclose exculpatory impeachment material before entering a plea agreement with a federal criminal defendant); see also Cook, *supra*, at 907 & nn.188–89 (noting that among the federally convicted in 2000, almost 50 percent had less than a high school education, and more than 50 percent of federal criminal defendants had appointed counsel in 1997). Finally, as one commentator has argued, the current sentencing regime based on the offense charged gives the prosecutor enormous power to establish the parameters of plea bargaining by deciding how to charge a particular defendant in the first instance. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1472–76 (1993). Thus, prosecutors may be encouraged to "over charge" a defendant in order to induce defendants to agree to a harsher plea than might otherwise be obtained. See *id.*

4. When one considers these key characteristics of the plea bargaining system, it becomes clear that there is more at stake than the fate of one criminal defendant when a prosecutor breaches a plea agreement. Whether or not a particular defendant can show prejudice in his case from the breached agreement, the acceptance of *any* breach will undermine the incentives for defendants—who are already at a disadvantage against the government—to place their trust in prosecutors to uphold their end of the bargain in exchange for the defendants' waivers of their constitutional rights. *Cf.* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 Int'l J. Psych. 117, 121–22 (2000) (concluding that most people, including criminal defendants, will view the outcome of a decision-making procedure as more fair if they have an opportunity to participate in the process and feel they can trust the authorities with whom they are negotiating). Should defendants—especially unrepresented defendants unschooled in the requirements of preserving issues for appellate review—come to believe that plea bargaining is a game of bait-and-switch filled with traps for the unwary, it would be unsurprising to find plea bargaining rates fall. This would be to the detriment of both society and defendants.

II. Whether Under the Plain Error Standard or Not, the Court Should Adopt a Rule Requiring Automatic Reversal for Breaches of Plea Agreements.

1. The law is clear that, where a prosecutor breaches a plea agreement and the defendant objects in a timely fashion, the sentence must be reversed without any consideration of prejudice. See

Santobello, 404 U.S. at 262–63.[2] In this case, however, defendant's counsel did not object to the breach of the plea agreement at the time of sentencing, and the question presented in this case is whether the "plain error" standard of Federal Rule of Criminal Procedure 52(b) should apply to the review of a breached plea agreement under such circumstances, or whether the breached plea agreement should instead be subject to *per se* reversal.

In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court explained how an appellate court should exercise its discretion to correct forfeited errors. The Court held that forfeited errors are subject to correction on appeal only if defendants show the following: (1) that there was an error in the district court proceeding; (2) that the error was "plain"; (3) that the error affected "substantial rights"—in other

---

[2] Subsequent decisions of this Court have reaffirmed *Santobello*'s holding that a prosecutor's breach of a plea agreement implicates important federal constitutional rights and requires automatic reversal. See, *e.g.*, *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984) ("[If] the defendant was not fairly apprised of its consequences * * * his plea [can] be challenged under the Due Process Clause. * * * [W]hen the prosecution breaches its promise * * *, the defendant pleads guilty on a false premise, and hence his conviction cannot stand * * *."); *Blackledge* v. *Allison*, 431 U.S. 63, 76 n.8 (1977) (if the prosecutor promised defendant a sentence that he did not receive, it would "raise[ ] the serious constitutional question whether his guilty plea was knowingly and voluntarily made") (citing *Santobello*, 404 U.S. 257); see also *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

words, was the defendant prejudiced; and (4) even assuming these first three requirements are satisfied, that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732–34 (internal quotations and citations omitted); see also *Johnson* v. *United States*, 520 U.S. 461, 466–67 (1997).

Applying this framework to the case of a breached plea agreement, *amicus* believes that there is no practical difference between adopting a *per se* rule requiring reversal and holding that the plain error standard applies. *Even if* Rule 52(b)'s plain error standard were to apply, the necessary outcome of applying the four-part test set forth by the Court in *Olano* must be reversal. Accordingly, this Court should simplify matters by holding that the plain error standard does not apply, and that breaches of plea agreements require *per se* reversal even if the error is not raised at the trial court.

2. It is conceded in this case that the prosecutor's breach of the plea agreement was an error and that the error was plain, thereby satisfying the first and second prongs of the *Olano* plain error analysis. Indeed, it is hard to imagine circumstances under which a material breach of a plea agreement would not satisfy these two threshold requirements. There can be no real dispute that, when a prosecutor reneges on specific promises made in a written plea agreement, that there has been an error, see *Olano*, 507 U.S. at 732–33 ("[d]eviation from a legal rule is 'error' unless the rule has been waived"), and that error is plain, see *id.* at 734 ("'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' * * * [T]he

error [must be] clear under current law.") (citations omitted).[3]

3. The Fifth Circuit concluded that Petitioner fell short of satisfying the third prong of the *Olano* test: whether the prosecutor's breach of the plea agreement prejudiced the defendant. In doing so, the Fifth Circuit erred. Under this Court's precedent, either there should be a presumption of prejudice when a plea agreement has been breached, or a reviewing court should not inquire into prejudice at all.

The *Olano* Court recognized circumstances under which a specific showing of prejudice may not be required: "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome * * *. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." 507 U.S. at 735. Thus, this Court's decision in *Olano* contemplated at least three categories of cases under a plain error analysis: (1) cases in which a showing of actual prejudice is required; (2) cases in which prejudice may be presumed; and (3) cases in which plain errors may be corrected regardless of prejudice. See *id.* at 734–35. In so doing, the *Olano* Court pointed to a prior decision discussing the types of errors that constitute "structural errors" in the harmless error context of Rule 52(a) and do not require proof of prejudice. See

---

[3] Although there may be some errors that are not "plain" to a judge who does not have a copy of a plea agreement or to a prosecutor who was not involved in the negotiation of the plea agreement, see Petitioner's Br. at 24–25, prosecutorial negligence should not be allowed to eliminate the plainness of the error.

id. at 735 (citing *Arizona* v. *Fulminante*, 499 U.S. 279, 306–10 (1991)).[4]

Decisions of this Court postdating *Olano* have likewise left open the possibility that there are situations in which defendants will not be required to demonstrate prejudice under a Rule 52(b) plain error analysis. Like *Olano*, those cases describe "structural errors" as errors for which no showing of prejudice may be required under Rule 52(b). See *United States* v. *Dominguez-Benitez*, 542 U.S. 74, 81 & n.6 (2004) (explaining that there are certain structural errors that "undermin[e] the fairness of a criminal proceeding as a whole" and therefore require reversal "without regard to the mistake's effect on the proceeding") (citing *Fulminante*, 499 U.S. at 309–10); *United States* v. *Cotton*, 535 U.S. 625, 632–33 (2002) (acknowledging, but not resolving, respondents' argument that in the plain error context an indictment error qualifies as a structural error that should be corrected regardless of its impact on the proceeding); *Johnson*, 520 U.S. at 468–69 (discussing, but not deciding, whether failure to submit an element of the offense to the jury was a "structural error" that necessarily affected substantial rights without a showing of prejudice).

---

[4] The harmless error rule applies to nonforfeited errors. Like the plain error rule set forth in Rule 52(b), however, the harmless error rule employs the phrase "affect substantial rights." See Fed. R. Crim. P. 52(a). Furthermore, as discussed *infra*, this Court has held that certain errors do not require proof of prejudice and therefore are not subject to the harmless error analysis. These cases are instructive on the type of errors that affect substantial rights under the plain error analysis without a showing of actual prejudice.

While the Court has frequently mentioned the possibility that there are exceptions for "structural errors" under Rule 52(b), it has never yet held in a case that such exceptions should be recognized. Nevertheless, this Court's Rule 52(a) jurisprudence (relied upon by *Olano*, 507 U.S. at 735) provides guidance as to when such an exception should be recognized.

First, this Court has held that errors may be structural, requiring no proof of prejudice, where the impact of the error is difficult to determine. In *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 152 (2006), for example, the Court held that a trial court's erroneous deprivation of a defendant's right to his choice of counsel qualified as a "structural error" not subject to review for harmlessness. The Court based its conclusion that the error was structural "upon the difficulty of assessing the effect of the error." *Id.* at 149 n.4. The Court reasoned that defense attorneys have widely varying styles and will pursue different strategies that will affect not only the trial, but whether a defendant decides to go to trial at all. Thus, an erroneous denial of a defendant's choice of counsel

> bears directly on the "framework within which the trial proceeds," * * * or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. * * * Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternative universe.

Id. at 150 (quoting *Fulminante*, 499 U.S. at 310). Other decisions of this Court have relied on similar reasons for requiring automatic reversal without any proof of prejudice. See, *e.g.*, *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (reversible error to deny defendant public trial because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"); *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, * * * we must presume that the process was impaired."); *id.* ("Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained.").

Like the fundamental errors at issue in *Gonzalez-Lopez*, *Waller* and *Vasquez*, the effect of a prosecutor's breach of a plea agreement on the outcome of the proceeding cannot easily be ascertained or quantified. While, to be sure, a plea agreement comes with no guarantees of a particular outcome, presumably millions of defendants over the years have entered into agreements requiring prosecutors to make (or not make) certain recommendations based on a belief that the prosecutor's recommendations could have some effect on the outcome. See, *e.g.*, *United States* v. *Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001) ("[W]hen the government agrees to recommend a certain sentence * * * the benefit to the defendant is that it presents a "united front" to the court. * * * [T]he chance that the court will follow the joint

recommendation is often the basis upon which defendants waive their constitutional right to trial.").[5]

Second, this Court has justified its categorization of certain errors as "structural" when automatic reversal was necessary to deter distasteful practices that offend the very principles on which the criminal justice system is based. As one set of commentators has explained:

> Deterrence becomes a relevant concern in two situations. First, when courts cannot effectively remedy the harm resulting from a particular type of constitutional error after the fact, they must attempt to minimize the occurrence of such errors. Only by deterring error in future cases can courts effectuate the values underlying constitutional rights falling into this category, such as fourth amendment rights and the fifth amendment privilege against self-incrimination.

---

[5] This case provides a good example of the uncertain effects of a breached plea agreement. The government promised Mr. Puckett that it would recommend a favorable adjustment under the sentencing guidelines for acceptance of responsibility. Because that promise was never fulfilled, it is impossible to assess what impact that recommendation might have had on the sentencing judge. Even though the district court noted at the sentencing hearing that credit for acceptance of responsibility would be "rare" when a defendant committed new crimes while awaiting sentencing, as Mr. Puckett did, we simply cannot know whether the government's recommendation might have led the district court to consider making Mr. Puckett's case one of those "rare" exceptions.

> Second, even when redoing the adjudicative process can repair the damage an error has already wrought, courts must use an overcompensatory sanction to prevent those errors that often escape detection.

Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 95 (1988).

For example, in *Vasquez*, the Court held that the exclusion of black jurors from the grand jury was reversible error not subject to the harmless error analysis because of the "overriding imperative to eliminate this systemic flaw in the charging process." 474 U.S. at 264; see also *id.* at 262 ("[I]ntentional discrimination in the selection of grand jurors is a grave constitutional trespass, * * * and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century * * * is not disproportionate to the evil that it seeks to deter."). Likewise, in *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936), the Court reversed a conviction based on an involuntary confession, without regard to whether defense counsel properly objected at trial, because "[t]he duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure."

So too here. If courts require defendants who have failed to object to a prosecutor's breach of a plea agreement in the district court to make a specific showing of prejudice, some prosecutor breaches will go unaddressed. Prosecutors may not see consequences of their broken promises, causing similar behavior among prosecutors to be encouraged rather than deterred. See Stacy & Dayton, *supra*, at 95–98 ("If prosecutors * * * feel they stand a

significant chance of escaping detection after committing constitutional error, they will likely conclude that the benefits from added convictions obtained with undetected constitutional violations outweigh the time, expense and embarrassment of the occasional reversal and retrial.").

Finally, this Court has held that the correction of errors is mandated, regardless of prejudice, when it is necessary to preserve the fairness and integrity of the criminal justice system. For example, in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, the Court held that the appointment of a biased prosecutor in a criminal contempt proceeding was a structural error that required reversal without regard to the facts of that case because such a practice "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." 481 U.S. 787, 811 (1987). The Court went on to explain that

> [a] concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. * * * Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

Id. at 811–12; see also *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (exclusion of juror in capital case who was not committed to vote against death penalty was reversible error not subject to harmless-error review because the issue "is rooted in the constitutional right to an impartial jury" and the "impartiality of the adjudicator goes to the very integrity of the legal

system"); *Vasquez*, 474 U.S. at 262 (discrimination in grand jury selection "strikes at the fundamental values of our judicial system and our society as a whole") (internal quotation and citation omitted).

It almost goes without saying that a system in which prosecutorial breaches of plea agreements are accepted, because, *e.g.*, a *pro se* defendant failed to object and cannot prove elusive "prejudice" to an appeals court, will test the public's confidence in the fair and efficient administration of justice. As one state supreme court has observed when assessing a prosecutor's breach of a plea agreement, "[t]he state's integrity is at stake. It is less evil that [a defendant] may escape execution than that the state's integrity be compromised." *Commonwealth* v. *Reyes*, 764 S.W.2d 62, 66 (Ky. 1989). As stated by another state supreme court, a prosecutor's promise "is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond." *Bowers* v. *State*, 500 N.E.2d 203, 204 (Ind. 1986). Thus, the damage to public perceptions of the fairness and integrity of the criminal justice system from breached plea agreements is yet another reason not to require a showing of prejudice.

4. For this same reason each prosecutorial breach of a plea agreement will satisfy the fourth prong of *Olano*'s plain error analysis. Under that prong, defendants must show that the error in question "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (internal quotations and citations omitted). As discussed *supra*, a breached plea agreement irreparably damages the public's perception of the criminal justice system by

undermining the fundamental values on which that system is based. Accordingly, the "fairness, integrity or public reputation" of judicial proceedings is necessarily affected when prosecutors break the promises they make to criminal defendants in exchange for those defendants' waivers of their fundamental constitutional rights.

5. To summarize, it is uncontroversial that a conviction entered following a breach of plea agreement must be reversed if the defendant timely objected to that error. The only question before the Court is whether, where the objection was not raised in a timely fashion, the defendant must specifically show that the plain error standard of Rule 52(b) has been satisfied. The answer should be no. The breach of a plea agreement implicates each of the three grounds for automatic reversal found in this Court's structural error decisions: a specific showing of prejudice would be highly speculative, an automatic reversal rule is necessary to deter future breaches of plea agreements, and such a rule is necessary to maintain public confidence in the fairness and integrity of the criminal justice system. Therefore, even assuming that Rule 52(b) is the appropriate standard of review in this case, the result under such an analysis would be the same as a holding in this case that a breached plea agreement is exempt from Rule 52(b) and reversible *per se*—*i.e.*, the defendant's conviction cannot stand and must be reversed.

CONCLUSION

To the extent this Court finds that the plain error standard applies to a forfeited claim that the government breached a plea agreement, this Court should hold that such an error is always plain, affects substantial rights without proof of prejudice,

necessarily impacts the fairness and integrity of the criminal justice system, and therefore requires reversal of a defendant's conviction. Because this result is identical to the result sought by Petitioner—that any guilty plea conditioned on a false promise must be reversed—NACDL urges the Court to adopt a *per se* rule of reversal.

Respectfully submitted,

BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

KEVIN P. MARTIN
DAHLIA S. FETOUH
Counsel of Record
JODI B. KALAGHER
NATALIE F. LANGLOIS
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for Amicus Curiae

November 24, 2008